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Nos. 82-1183, 82-1187, 82-1199, 82-1240, and 82-1255

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAYMOND F. LEDERER, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. MURPHY, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK THOMPSON, JR., PETITIONER

v.

UNITED STATES OF AMERICA

HOWARD L. CRIDEN, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL O. MYERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government must have probable cause to suspect a member of Congress of a crime, or of a predisposition to commit a crime, before it conducts an investigation of him and videotapes his meetings with undercover agents.

2. Whether the Due Process Clause barred petitioners' convictions for offenses relating to bribery because the unlawful payments were offered by undercover government investigators, because a government informant allegedly urged certain petitioners to be as explicit as possible in stating what they would do in return for the illegal payments, or because the informant allegedly engaged in misconduct that did not prejudice petitioners.

3. Whether the government improperly concealed exculpatory evidence, so that certain petitioners' convictions should be reversed.

4. Whether a ready response to an undercover agent's offer of an illegal payment can be sufficient to establish predisposition, and thereby defeat petitioner Lederer's entrapment defense.

5. Whether petitioner Murphy's conviction should be reversed because of error in the supplemental instruction given to the jury.

6. Whether the district court gave too unfavorable an instruction on petitioner Thompson's credibility as a witness at his own trial.

7. Whether evidence of a meeting between petitioner Myers and undercover agents, occurring after the illegal payment was made to petitioner Myers, was improperly admitted.

TABLE OF AUTHORITIES

Cases: Page

Burton v. *United States*, 202 U.S. 344 5
Cupp v. *Naughten*, 414 U.S. 141 31
Gravel v. *United States*, 408 U.S. 606 ..... 13, 14
Hampton v. *United States*, 425 U.S. 484 .....17, 18, 19
Hicks v. *United States*, 150 U.S. 442 31
Hoffa v. *United States*, 385 U.S. 293 12
Oyler v. *Boles*, 368 U.S. 448 16
Reagan v. *United States*, 157 U.S. 301 31
Sherman v. *United States*, 356 U.S. 369 18
Sorrells v. *United States*, 287 U.S. 435 18
Taylor v. *United States*, 390 F.2d 278 32
United States v. *Becker*, 62 F.2d 1007 27
United States v. *Boyd*, 595 F.2d 120 33
United States v. *Bramblett*, 348 U.S. 503 14
United States v. *Brewster*, 408 U.S. 501..4, 5, 13, 14, 16-17
United States v. *Diggs*, 613 F.2d 988, cert. denied, 446 U.S. 982 14
United States v. *Goodwin*, No. 80-2195 (June 18, 1982) 16
United States v. *Hood*, 343 U.S. 148 25
United States v. *Johnson*, 383 U.S. 169 4
United States v. *Jannotti*, 673 F.2d 578, cert. denied, 457 U.S. 1106 ..... 19, 27
United States v. *Laurelli*, 293 F.2d 830, cert. denied, 368 U.S. 961 33
United States v. *Mayo*, No. 82-1256 (2d Cir. Apr. 8, 1983) 28
United States v. *Russell*, 411 U.S. 423 18
United States v. *Saletko*, 452 F.2d 193, cert. denied, 405 U.S. 1040 32
United States v. *Twigg*, 588 F.2d 373 19
United States v. *Valencia*, 645 F.2d 1158 28
United States v. *White*, 401 U.S. 745 ..... 12, 13
United States v. *Williams*, No. 82-1111 (2d Cir. Apr. 5, 1983) 28

Constitution, statutes and rule: Page

U.S. Const.:

Art. 1, § 5, Cl. 2 ..... 4-5, 15
Art. 1, § 6, Cl. 2 (Speech or Debate Clause) 4, 13, 14
Amend. I 15
Amend. V (Due Process Clause) 11, 13, 14, 17-18, 20, 21, 23

18 U.S.C. 2 4
18 U.S.C. 201 ..... 4, 5
18 U.S.C. 201(c) 24, 25
18 U.S.C. 201(e) 24
18 U.S.C. 201(g) 6, 10
18 U.S.C. 203(a) 10
18 U.S.C. 371 4
18 U.S.C. 1952 4
18 U.S.C. 4205(c) 11
Fed. R. Evid. 404(b) 32

Miscellaneous:

H.R. Rep. No. 95-1817, 95th Cong., 2d Sess. (1978) 19

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-83a)[1] is reported at 692 F.2d 823. The opinion of the district court (Pet. App. 84a-249a) is reported at 527 F. Supp. 1206. The opinion of the court of appeals on an interlocutory appeal by petitioner Myers (Pet. App. 250a-272a) is reported at 635 F.2d 932. The opinion of the court of appeals on an interlocutory appeal by petitioners Murphy and Thompson (Pet. App. 273a-282a) is reported at 642 F.2d 699.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. The petitions for rehearing were denied on November 17, 1982. The petitions for a writ of certiorari in Nos. 82-1183, 82-1187 and 82-1199 were filed on January 14, 1983; the petitions in Nos. 82-1240 and 82-1255 were filed on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(2).

STATEMENT

Petitioners were convicted, in three jury trials in the United States District Court for the Eastern District of New York, of offenses arising out of what is known as the Abscam investigation.

1. In the course of this investigation, Melvin Weinberg, an FBI informant, acted as the representative of a fictitious organization supposedly backed by two wealthy Arab sheiks seeking to invest their money in the United States. Petitioner Errichetti, the mayor of Camden, New Jersey, and a New Jersey state senator, contacted Weinberg in connection with investments in casinos then being built in Atlantic City, New Jersey. The district court found that "Errichetti claimed to have extraordinary influence in obtaining gambling casino licenses, power over the commissioners who issued the licenses, connections with organized crime, ability to deal in narcotics, guns and counterfeit

[1] "Pet. App." references are to the appendix to the petition in No. 82-1199.

securities, as well as intimate knowledge of which members of the New Jersey legislature could be [bo]ught." Pet. App. 93a-94a.

At one meeting Errichetti, Weinberg, FBI undercover agent Amoroso, who was also posing as a representative of the sheiks, and petitioner Criden, an attorney brought to the undercover agents by Errichetti, discussed problems that might arise if a revolution occurred in the sheiks' country and they wanted to seek asylum in the United States.[2] As the district court found, "[i]mmediately after this conversation Errichetti and Criden formed an alliance in which they undertook to produce for Amoroso and Weinberg public officials who, in return for money, were willing to use their influence with the government on the sheiks' behalf." Pet. App. 95a.

Specifically, Criden told his law partners, petitioner Johanson and Ellis Cook (who testified for the government under a grant of immunity), that if they arranged meetings between Congressmen and the sheiks or their representatives, $100,000 would be paid to each Congressman and shared with the person who arranged the meeting. Johanson then contacted petitioner Myers, who was a member of the House of Representatives. Myers and Errichetti met with Weinberg and Amoroso in a hotel room; the FBI recorded the meeting on videotape. Pet. App. 16a-17a.[3] The court of appeals described the meeting as follows (*id.* at 17a):

> Early in the conversation, Myers boasted of his influence in Congress. When Amoroso mentioned his [earlier] conversation * * * with Errichetti concerning the sheiks' possible immigration problems, Myers replied, "Absolutely. Where I could be of help in this type of matter, first of all, is private bills that

[2] Errichetti and Criden travelled to Florida for this meeting. Pet. App. 94a-95a.

[3] This meeting was held at Kennedy Airport, in the Eastern District of New York. Petitioners travelled from New Jersey and Pennsylvania to attend. Pet. App. 17a.

> can be introduced." Myers explained that delay was important in immigration matters and said, "[I]f I wanta keep somebody in the country, all I do is introduce a private bill." Later in the conversation, Amoroso told Myers that his employer was planning major investments in the United States, possibly including something in Philadelphia. Myers agreed with Amoroso that such an investment in his district would give him "a little protection," and added that it would provide a reason to go "full force and, ah, not that I won't otherwise," and the "perfect opportunity to raise hell before Congress." At the end of the meeting Amoroso handed Myers an envelope containing $50,000 in $100 bills. Amoroso said, "Spend it well"; Myers replied, "Pleasure."

The money in the envelope was divided among Myers (who received $15,000), Errichetti (who received $15,000), Criden, Johanson, and Cook. At a subsequent meeting among Myers, Criden, and two other undercover agents who were posing as representatives of the sheiks, Myers complained about the small size of his payment. *Id.* at 18a.

Myers, Errichetti, Criden, and Johanson were each indicted on three counts: conspiracy to defraud the United States and to violate 18 U.S.C. 201, which prohibits bribery of public officials, in violation of 18 U.S.C. 371; bribery and aiding and abetting bribery, in violation of 18 U.S.C. 201 and 2; and travelling in interstate commerce to carry on the unlawful activity of bribery, in violation of 18 U.S.C. 1952.[4] They were tried together,

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[4] Petitioner Myers unsuccessfully moved to dismiss the indictment, then appealed the denial of that motion. The court of appeals rejected, on the merits, his claims: that 18 U.S.C. 201 violates the Speech or Debate Clause of the Constitution, Article I, Section 6, Clause 2 (Pet. App. 258a, citing *United States* v. *Brewster*, 408 U.S. 501 (1972), and *United States* v. *Johnson*, 383 U.S. 169 (1966)); that his indictment was invalid because it alleged an agreement to perform a legislative act in return for a bribe (Pet. App. 259a, citing *United States* v. *Brewster*, *supra*); that Congress, acting under its Article I, Section 5, Clause 2 power to "punish its

and Myers, the only one of the four to testify, explained that he was only "playacting"; that is, "Myers * * * claimed that Weinberg had told Errichetti, and Errichetti had told Myers, that nothing would ever have to be done for the sheiks in connection with immigration. According to Myers, Errichetti told him just prior to the [first] meeting what he should say to impress the sheik's representatives. Myers claimed that he did not intend to fulfill any of the promises he made at the meeting." Pet. App. 19a. Over the government's objection, the district court instructed the jury that it should convict only if it found that Myers was not "playacting." *Ibid.* All of the defendants were convicted on all counts.[5]

2. Petitioner Lederer, another member of Congress, was also contacted by Johanson. According to Cook's testimony, Johanson said that he had explained the sheiks' feared immigration problems to Lederer and had told Lederer that the sheiks' representatives insisted that the Congressman accept the money personally, presumably in order to ensure that he would be obligated to the sheiks. Lederer and Errichetti met in a hotel room at Kennedy Airport with Weinberg and Amoroso; this meeting was also recorded on videotape. Pet. App. 19a. The

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Members for disorderly Behavior," has exclusive jurisdiction to punish bribery (Pet. App. 260a, citing *United States* v. *Brewster*, *supra*, and *Burton* v. *United States*, 202 U.S. 344, 367 (1906)); that Section 201 should not be interpreted to permit prosecutions growing out of undercover investigations like Abscam (Pet. App. 262a-267a); that Section 201 did not reach Myers' alleged conduct because the subject of the legislative act he promised to take was fictitious (*id.* at 267a-268a, citing *United States* v. *Brewster*, *supra*, 408 U.S. at 526-527); and that some level of suspicion, such as probable cause, should have been required before he was investigated (Pet. App. 269a-270a). This Court denied certiorari. 449 U.S. 956 (1980).

[5] Errichetti and Criden were each sentenced to concurrent terms of six years' imprisonment and fines totalling $40,000. Myers and Johanson were each sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 9a.

court of appeals described this meeting as follows (*id.* at 19a-20a):

> Lederer said that Errichetti had briefed him on the sheik's immigration problems. When Amoroso said, "I understand that you can introduce legislation," Lederer replied, "Right, a bill. Private bill. Sure." Lederer then raised a concern that people might ask, "Why all at once does a Philadelphia Congressman want to help somebody . . .?" * * * At the end of the meeting, Amoroso handed Lederer a bag containing $50,000 in $100 bills, commenting, "I hope you don't mind a brown paper bag with this in" and adding, "I hope you spend it well."

Criden distributed this money, giving Cook an envelope containing $5,000 marked "RL" (for petitioner Lederer), and telling Cook that Errichetti had taken $20,000 and Criden and Johanson $15,500. Johanson subsequently passed the $5,000 to Lederer. Approximately five months later, FBI agents interviewed Lederer about the meeting; Lederer denied that Errichetti was present, denied that private immigration bills had been discussed, and denied that he had received a package or a brown paper bag. Pet. App. 20a.

Lederer, Errichetti, Johanson, and Criden were each indicted on four counts. Three paralleled the counts of the Myers indictment; the fourth charged that Lederer, aided and abetted by the others, received an illegal gratuity in violation of 18 U.S.C. 201(g). Errichetti, Johanson, and Criden were severed after they were convicted in the Myers prosecution. At trial, Lederer acknowledged that he had received $5,000 of the $50,000 handed him by Amoroso. His only defense was that he had been entrapped. He was convicted on all counts and sentenced to three years' imprisonment and fines totalling $20,000. Pet. App. 9a-10a.

3. Petitioner Thompson, then a Representative from New Jersey, was introduced to Criden by Joseph Silvestri, a New Jersey businessman, after Criden asked Silvestri

about Congressmen who would be willing to meet with the sheiks' representatives. Criden told Weinberg that Thompson had agreed to cooperate and would meet with Weinberg and Amoroso. At approximately the same time, Criden also explained to Cook, his law partner, that arrangements had been made so that Thompson would not have to accept the money personally. Thompson, Criden, Weinberg, and Amoroso held a videotaped meeting on October 9, 1979, to discuss private immigration bills and their usefulness in delaying deportation. When Amoroso mentioned money, Thompson insisted that he was not interested in receiving money but continued to give assurances that he would do whatever he could to help the sheiks. The meeting ended with no money having been exchanged. Pet. App. 21a.

Later in the same day, Criden alone returned for another meeting with Weinberg and Amoroso. The court of appeals described this videotaped meeting (Pet. App. 21a-22a):

> Criden complained that at the morning session Amoroso had altered their agreement, which, he claimed, called for no mention of money and Criden simply receiving a package. Weinberg and Amoroso denied making such an arrangement, stating that they were willing to have Criden take the package as long as Thompson acknowledged the money. Criden demurred, arguing that Thompson was too experienced and suspicious and could not be expected to act like Myers and Lederer. Criden agreed to talk with Thompson and telephoned to arrange a meeting with the Congressman.

In the evening of that same day, Thompson and Criden met again with Amoroso. Criden said "Frank [Thompson] understands the situation." Amoroso replied, "There's the briefcase" and pointed to a briefcase containing $50,000 in cash. Thompson then said to Criden either "You look after that for me will you?" or "You look at that for me will you?"; the tape is indistinct. Pet. App. 22a; see *id.*

at 2a. The discussion turned to investments, and Thompson said that investments by the sheik in his district "would put him in a position to justify his support of the sheik." *Id.* at 22a. At another point, Amoroso, recalling the morning conversation, said that they had then been "shadow boxing," to which Thompson replied, "Well, you have to be careful." *Ibid.* At the end of the meeting, both Thompson and Criden momentarily lifted the briefcase, and Criden carried it away. Criden subsequently reported to Cook that Thompson had taken $20,000 of the money. *Ibid.*

During the meeting on the evening of October 9, Thompson said he might send his "pal," petitioner Murphy, a Congressman from New York, to meet with the sheiks' representatives. Pet. App. 22a. Thompson then met with Murphy and arranged for him to meet Criden, and on October 20, 1979, Murphy and Criden met Weinberg and Amoroso at a videotaped meeting,[6] which the court of appeals described as follows (*id.* at 23a):

> The discussion centered on the sheik's anticipated immigration problems. Amoroso said that his employers felt it was worth "whatever they have to put out" to obtain assistance. Amoroso explained that his employer had said, "[T]ake the money, go find the people that can, can do this for me." Criden replied, "All you have to do is get a hold of me. I will get a hold of Jack [Murphy]." Later, Weinberg said, commenting on the apparent absence of any problem, "As long as the man says he's going to take care of it. That's what counts." Murphy answered, "Yeah." Weinberg then made clear that it would be a "different deal" if any help was needed for anyone other than the two employers that had been mentioned. "[I]n other words," Amoroso explained, "these, what we're, what we're coming up front with, the money for is just for these two guys." Murphy answered,

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[6] This meeting was also held at Kennedy Airport, and the money was taken to New Jersey and Pennsylvania to be distributed. Pet. App. 23a-24a.

> "Yeah." At the end of the meeting Amoroso picked up a briefcase containing $50,000 in $100 bills. Criden said, "Why don't you give that to Jack." Murphy said, "Howard [Criden] why don't you take care of that."

The court of appeals also stated that the jury could have concluded that Murphy said "Howard why don't you take care of that for me?" *Id.* at 23a n.6.

Criden later told Cook that Thompson was to be given $25,000 of this money, of which $15,000 was Murphy's share; Thompson telephoned Criden and arranged a meeting, and after the meeting Criden told Cook he had delivered the money to Thompson. When questioned by FBI agents about his meetings with Weinberg and Amoroso, Thompson denied that immigration matters had been discussed and denied that anyone had received a briefcase. Pet. App. 24a, 25a.[7]

Subsequently, Amoroso took Murphy aside at another videotaped meeting described by the court of appeals (Pet. App. 25a):

> In this conversation Murphy acknowledged the dangers of speaking about money * * * . Murphy told Amoroso, "[A]ny time money's mentioned where a public official is mentioned, there—there's automatically an ability to link 'em to something illegal or to taking a consideration for something, uh, that he's supposed to do or use his office to do and there's, no public official would ever be involved in anything like

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[7] Subsequent events involving Representative John Murtha of Pennsylvania, who received no money and was not indicted, are also relevant to the Thompson and Murphy prosecutions. Thompson gave Murtha's name to Criden and suggested that Murtha was a candidate to meet with the sheiks' representatives. Murtha testified at trial that Thompson had told him, in conversations on the House floor, "that there would be $50,000 in 'walking around money' for Congressmen willing to help" wealthy Arabs who might need assistance on immigration matters. Thompson also told Murtha that he had enlisted Murphy in the enterprise. Pet. App. 24a.

> that . . . Particularly Thompson, myself, or Murtha.[8] We'd never do anything like that. See?" Amoroso said, "[Y]ou're being coy with me." Murphy said, "Sure." Then when Amoroso said he had been reluctant to give Murphy money, Murphy said, "You didn't, you didn't give me any money. . . . I never, received any money from anyone." The conversation continued with the two discussing future plans for Murphy to meet the sheik.

Thompson and Murphy were indicted (together with Criden and Silvestri, who were subsequently severed) on five counts—bribery, conspiracy, and interstate travel charges paralleling those of the Myers indictment; an unlawful conflict of interest, consisting of the receipt of money "as compensation for services to be rendered before departments, agencies and officers of the executive branch of the Government" in an immigration matter involving foreign nationals, in violation of 18 U.S.C. 203(a); and receipt of an unlawful gratuity, in violation of 18 U.S.C. 201(g). Pet. App. 10a-11a.[9] The basis of the substantive charges against Thompson was his receipt of money exchanged at the October 20 meeting; the October 9 meeting was used as evidence of the conspiracy.

Thompson testified in his own behalf and denied receiving any money. Pet App. 25a. Murphy neither testified nor called any witnesses; his defense, argued in summation, was that he had not received any money. *Id.* at 25a-26a. The interstate travel count was dismissed by the district court. Thompson was convicted of conspiracy, bribery, and receipt of an unlawful gratuity; he was acquitted of unlawful conflict of interest. Murphy was convicted of conspiracy, conflict of interest, and receipt of

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[8] See page 9 note 7, *supra*.

[9] Petitioners Thompson and Murphy took an interlocutory appeal from the denial of their motion to dismiss the indictment. The court of appeals affirmed (Pet. App. 273a-282a), holding that their claims were controlled by its holdings on petitioner Myers' interlocutory appeal. See pages 4-5 note 4, *supra*.

an unlawful gratuity; he was acquitted of bribery. Pet. App. 11a.[10]

4. After the trial and before sentencing, the district court conducted a 16-day hearing to consider claims by all seven petitioners that their convictions should be overturned and the indictments dismissed because of various forms of government misconduct and errors at the trial. The court permitted petitioners to rely on evidence developed in other trials that grew out of the Abscam investigation. The district court denied relief, writing a comprehensive opinion. Pet. App. 84a-249a. Petitioners appealed from their convictions, and the court of appeals, also writing a comprehensive opinion, unanimously affirmed all the convictions except for petitioner Murphy's conviction of unlawful conflict of interest, which it reversed and remanded for a new trial. *Id.* at 5a-83a.

ARGUMENT

Most of the petitioners raise, in some form, two contentions applicable to the Abscam investigation generally —that it should not have been conducted without probable cause to believe that the members of Congress to whom payments were offered were guilty of, or predisposed to commit, related offenses; and that the level of government involvement violated the Due Process Clause. These contentions are without foundation in the law. Petitioners also "voice a chorus of indignation" concerning informant Weinberg (Pet. App. 50a), but they fail to show that any of their claims about Weinberg entitle them to relief. Finally, petitioners make a variety of contentions bearing on their particular cases, many of which are

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[10] Murphy was sentenced to concurrent terms of three years' imprisonment and fines totalling $20,000. Pet. App. 11a. The effect of the court of appeals' reversal of his conviction on the conflict of interest charge (see page 11, *infra*) was to reduce his aggregate fine by $10,000. Pet. App. 83a n.37. Thompson was tentatively sentenced to the maximum terms, as required by 18 U.S.C. 4205(c) to permit further evaluation of his medical condition. Pet. App. 11a.

plainly insubstantial and all of which are of insufficient importance to warrant this Court's review.

1. Several petitioners, and amicus curiae American Civil Liberties Union, contend that the government should not be permitted to investigate members of Congress unless the government already has probable cause to believe that they have committed or are predisposed to commit the offense under investigation. See 82-1183 Pet. 9-14; 82-1199 Pet. 20-44; 82-1255 Pet. 24-27, 49-56; ACLU Am. Br. 6-7. See also 82-1240 Pet. 20-21.

We note at the outset that the government did not engage in random investigations of petitioners; each of the petitioners either approached the undercover agents of his own accord or was introduced as a person willing to engage in corrupt activities by another person who had shown his willingness to do so. See Pet. App. 27a n.7, 149a-150a. More important, however, petitioners do not suggest, and cannot suggest, that the decisions of this Court or the language of the Constitution requires that the government have any level of suspicion—much less probable cause—before undertaking an investigation of the kind at issue here. Whether petitioners' proposed restrictions on criminal investigations are desirable as a matter of policy is a question that belongs to the domain of legislation, not constitutional adjudication.

Probable cause is required only for a search or a seizure, and the videotaped investigation of petitioners did not constitute a search or a seizure. *Hoffa* v. *United States*, 385 U.S. 293 (1966), and *United States* v. *White*, 401 U.S. 745 (1971), establish that one party to a conversation may record it without invading any constitutionally protected interest of the other parties, and petitioners identify nothing in the logic of *Hoffa* or *White* suggesting that a different result should obtain when audio recording is supplemented by video recording—which can only result in a more accurate record of the events at issue. See, *e.g.*, *United States* v. *White*, *supra*, 401 U.S. at 751-753 (plurality opinion) ("If the conduct and revelations

of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking * * *. [W]e are not prepared to hold that a defendant who has no constitutional right to exclude the informer's unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question.").[11]

Similarly, except for one insubstantial contention by petitioner Lederer,[12] petitioners do not assert that they

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[11] Petitioner Thompson asserts (82-1199 Pet. 35-36) that in *White* the government had probable cause to believe that the defendant would engage in criminal conduct during the recorded conversation. But the Court in *White* never referred to the existence of probable cause, and the clear holding of that case is that probable cause is unnecessary.

[12] Petitioner Lederer asserts (82-1183 Pet. 22-23) that the Speech or Debate Clause precluded the government from introducing into evidence a financial disclosure statement he had filed as required by House rules. As the court of appeals explained, however (Pet. App. 58a), this statement was in no sense a contribution to a legislative debate or to any other form of legislative activity; it plainly does not fit within this Court's definition of legislative acts. See page 14, *infra*. Petitioner Lederer's only argument to the contrary is that because establishing rules like that requiring the disclosure statement "is the constitutional prerogative of the House, anything done in that regard, including the filing of reports, is shielded by the Speech or Debate Clause." 82-1183 Pet. 23. This is a non sequitur; nothing in the Constitution suggests that everything done pursuant to the internal rules of the House is "Speech or Debate." "In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process. * * * The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions" (*United States* v. *Brewster*, 408 U.S. 501, 515, 528 (1972) (emphasis in original)). Nor does that Clause protect all actions performed by members of Congress "in their official capacity" (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)).

Indeed, petitioner Lederer concedes (82-1183 Pet. 23) that he could be punished for filing a false disclosure statement; this would

are being prosecuted for activities that fall within the ambit of the Speech or Debate Clause. That Clause protects only "legislative acts," and as the Court has specifically stated (*Gravel* v. *United States*, 408 U.S. 606, 625 (1972)):

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

It is entirely clear that petitioners' dealings with the undercover agents were not legislative acts; they were, at most, contacts with possible constituents, and the Court has explicitly rejected the suggestion that " 'errands' performed for constituents [or] the making of appointments with Government agencies" are legislative acts. *United States* v. *Brewster*, 408 U.S. 501, 512 (1972). In light of these settled principles, petitioners do not seriously contend that the acts for which they were prosecuted are themselves protected by the Speech or Debate Clause.

Instead, petitioners appear to assert that although the Abscam investigation and prosecution violated no identifiable constitutional provision, the combination of videotaping and the fact that some of the targets were members of Congress somehow made the investigation offen-

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not be so if such statements truly fell within the Speech or Debate Clause. We note that it is well established that members of Congress can be prosecuted for making false statements to agencies of the House of Representatives. See, *e.g.*, *United States* v. *Bramblett*, 348 U.S. 503 (1955) (false statements to House Disbursing Office); *United States* v. *Diggs*, 613 F.2d 988 (D.C. Cir. 1979), cert. denied, 446 U.S. 982 (1980) (false statements to House Office of Finance).

sive to constitutional values.[13] Petitioners cite no case supporting this contention, however. The only argument they advance is that any other result would create an unacceptable danger that the executive branch will harass or intimidate members of Congress for political reasons. See 82-1183 Pet. 12-13; 82-1199 Pet. 22-23; 82-1255 Pet. 25, 52-53.

We do not dispute that politically motivated investigations are improper. But petitioners do not point to, and no court has found, the slightest evidence that the investigation of petitioners was politically motivated. As the court of appeals stated, the suggestion that "the Government targeted the defendant Congressman for political or other impermissible reasons * * * is flatly contradicted by the evidence. The Government had no role whatever in the selection of any of the four Congressmen involved [here] * * *. Criden and Johanson selected Congressmen

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[13] Petitioner Murphy makes a somewhat related argument that purports to rest on the First Amendment but is in fact a challenge to the sufficiency of the evidence against him. 82-1187 Pet. 13-18. Petitioner Murphy does not contend that the act of which the jury found him guilty—"directly or indirectly ask[ing], demand[ing], exact[ing], solicit[ing], seek[ing], accept[ing], or receiv[ing], or agree[ing] to receive anything of value for himself for or because of any official act performed or to be performed by him" (18 U.S.C. 201(g))—is protected by the First Amendment. Instead, he claims that his guilt was "inferred from constitutionally protected activity" (81-1187 Pet. 14; see *id.* at 15, 16 n.15). But it is entirely permissible, and indeed commonplace, to use constitutionally protected speech as *evidence* of an element—usually a mental element—of an offense. To give an obvious example, expressions of personal animosity toward another are ordinarily protected by the First Amendment, but they can of course be used as evidence that the speaker intended to harm the person of whom he spoke.

Petitioner Murphy's First Amendment claim in fact dissolves into a contention that there was insufficient evidence of his guilt. See 82-1187 Pet. 15, 17-18. But there was abundant evidence of Murphy's guilt: for example, the references to money at the meeting, which the jury could view on videotape; the secretive way in which the payment was made, which the jury again saw; the evidence that Murphy had been briefed; and his "coy" videotaped discussion with Amoroso about the virtues of being discreet.

Myers and Lederer. Silvestri selected Congressm[a]n Thompson. Thompson selected Congressman Murphy." Pet. App. 27a n.7. Petitioners also do not explain why the danger of politically motivated investigations requires that *all* prosecutions of members of Congress resulting from investigations initiated without probable cause be barred; in any other case involving a claim that a prosecutorial decision was motivated by an impermissible purpose (see, *e.g.*, *United States* v. *Goodwin*, No. 80-2195 (June 18, 1982); *Oyler* v. *Boles*, 368 U.S. 448 (1962)), the courts would determine in a particular case, relying on rebuttable presumptions if appropriate, whether the action was improperly motivated. Moreover, videotaping would seem to reduce the threat of politically motivated investigations, by eliminating so far as possible the danger that an investigator will misunderstand or distort a target's responses.

In any event, if politically motivated *investigations* violate the Constitution, barring a *prosecution* is an irrational remedy for the violation. On petitioners' own hypothesis, the danger is that the executive branch will conduct such an investigation not in order to institute a criminal prosecution through lawful means, but in order to collect information of lawful but embarrassing acts or statements by members of Congress. Prohibiting a prosecution would, therefore, be unlikely to deter an investigation of the kind petitioners fear; such an investigation could still purport to be concerned with others associated with the member of Congress, or with civil wrongs. Indeed, the principal effect of petitioners' approach would be to benefit those members of Congress whom the executive branch in fact had legitimate reason to investigate and who were in fact willing to engage in criminal conduct.[14] See also *United States* v. *Brewster*,

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[14] As the court of appeals pointed out when it considered Myers' interlocutory appeal (Pet. App. 263a): "Any Member of Congress approached by agents conducting a bribery sting operation can simply say 'No.' Each Member's capacity to reject bribe opportunities could be regarded as sufficient safeguard against the risk that

supra, 408 U.S. at 524-525 ("[F]inancial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.").

In our view, there was nothing repugnant to constitutional values in the conduct of the Abscam investigation. The government did not tape meetings between members of Congress and their families or their close personal or political associates; it taped meetings that the targets believed to be of a purely business character between members of Congress and strangers who were seeking special treatment and who had made no secret of their willingness to spend large amounts of money to obtain it. The values of a democratic society will not be disserved if members of Congress are put on notice that, if the other parties to the meeting so desire, the members' conduct at such meetings may some day be reported, in the most accurate possible form, to the public.

2. Only petitioner Lederer claimed at trial that he was entrapped. Pet. App. 28a.[15] But several petitioners contend that the conduct of the investigation was so outrageous that their convictions must be reversed. See 82-1183 Pet. 15-19; 82-1189 Pet. 45-57; 82-1240 Pet. 13-21; 82-1255 Pet. 31-49. This contention relies on the suggestion made by some of the Justices in *Hampton* v. *United States*, 425 U.S. 484 (1976), that even if a defendant is not entrapped, government involvement in a

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the Executive Branch would successfully use these tactics for political reprisal." The court of appeals further noted (*id.* at 263a-264a) that there is no reason to doubt Congress's ability to recognize any dangers of politically motivated investigations and to take appropriate legislative action. "Once the Supreme Court decided in *Brewster* that the Constitution does not prevent Congress from applying the criminal law enforcement process to a Member's acceptance of a bribe in return for a promise of legislative action, the way was cleared for that process to function without any special constitutional restraints arising from the status of the defendant." *Ibid.*

[15] We discuss the arguments raised by petitioner Lederer in connection with his entrapment defense at pages 26-28, *infra*.

crime may reach such a level that the Due Process Clause may bar a conviction. Petitioners' principal argument in support of this contention is that the government "created" the crimes for which they were convicted rather than "detecting" independently-existing criminal conduct. See, *e.g.*, 82-1199 Pet. 19, 50; 82-1255 Pet. 34, 39-47. Petitioners also assert that the allegedly unsavory background and conduct of FBI informant Weinberg somehow caused the investigation to violate due process (*e.g.*, 82-1240 Pet. 13-21; 82-1255 Pet. 32) and that the inducements they were offered were too large (*e.g.*, 82-1255 Pet. 32, 36-37).

a. It is well settled that the government does not violate the Due Process Clause merely by providing a predisposed defendant with the means and the opportunity to commit a crime. See *Hampton* v. *United States*, *supra*; *United States* v. *Russell*, 411 U.S. 423, 435-436 (1973); *Sherman* v. *United States*, 356 U.S. 369, 372 (1958); *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932). As the court of appeals explained, that is all the government did here (Pet. App. 32a; footnote omitted):

> Though the "sting" was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so. The Government produced people with fictitious identities ready to pay bribes to Congressmen. Word of the availability of bribe money was made known. From that point on, the essential conduct of the agents and their paid informant was to see who showed up to take the bribes and videotape them in the act of doing so. Whatever may be the due process limit of governmental participation in crime, it was not reached here.

The essence of due process is "fundamental fairness" (*Hampton* v. *United States*, *supra*, 425 U.S. at 492 (Powell, J., concurring)), and there is no discernible sense in which the government's role in this investigation resulted in petitioners' being treated unfairly. The investigation did no more than replicate circumstances in which a public offiical might find himself; there was no

possibility that the investigation would incriminate a public official who was not susceptible to accepting illegal payments. As the district court remarked "each [petitioner] was a willing volunteer seeking illegal and corrupt payments." Pet. App. 152a. Nor was this a case in which it might be said that the defendants were no more than minor actors in a government-operated criminal enterprise (cf. *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978)); petitioners were central figures whose refusal to engage in illegal conduct would have caused this aspect of the Abscam operation to collapse.[16]

Moreover, whatever the importance to society of exposing persons to various temptations to engage in other kinds of unlawful activity (cf. *Hampton*, 425 U.S. at 498 (Brennan, J., dissenting); *United States* v. *Twigg*, *supra*), there is a clear and important interest in exposing public officials who will accept bribes. It is surely reasonable to assume that officials will on occasion be offered illegal payments of the kind involved in this case (cf. *Hampton*, 425 U.S. at 496 n.1 (Brennan, J., dissenting) ("a reasonable * * * inquiry might be whether the accused would have obtained the contraband from a source other than the Government"); the crafty behavior of petitioners Thompson and Murphy indeed appears to be evidence that such schemes are not uncommon. At the same time, it is exceedingly difficult to discover a bribery-related offense except through undercover investigation of some form, because all of those with knowledge of the offense have a strong interest in concealing it. See Pet. App. 263a.[17] In addition, as we have noted, petitioners were not selected at random; they came to the undercover

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[16] *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982)—an Abscam case—makes untenable any suggestion of a conflict between *Twigg* and the instant decision of the court of appeals.

[17] Congress itself recognized this point in its report on an investigation into alleged efforts by representatives of the Republic of Korea to buy influence. See H.R. Rep. No. 95-1817, 95th Cong., 2d Sess. 93-94 (1978).

agents through contacts that are presumably very similar to those that would be developed if an actual wealthy potential immigrant were seeking to buy influence. And as both courts below noted (Pet. App. 262a n.7, 161a-162a), petitioners' culpable acts were videotaped from start to finish so that they could be brought before the jury in the most complete and accurate fashion possible, not subject to the interpretations of the undercover agents or to contests over credibility. In these circumstances, there is no basis for concluding that the investigation transgressed the Due Process Clause.[18]

b. Petitioners Myers, Errichetti, Johanson, and Criden also argue that the government violated the Due Process Clause in its use of informant Weinberg. See 82-1255 Pet. 31-49; 82-1240 Pet. 13-21. (Petitioner Criden makes a similar argument about petitioner Errichetti. 82-1240

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[18] The court of appeals also disposed correctly of petitioners' suggestion that the inducements were so great that they violated due process. As it noted, these contentions appear to refer not to the $50,000 bribes, but to the large investments the sheiks proposed to make; and as the court explained (Pet. App. 33a):

> We have considerable difficulty with the premise of this argument, which is that a Congressman is privileged to take a $50,000 bribe so long as he simultaneously believes he is bringing the benefits of investments to his district. * * * [Moreover,] the facts of these cases belie the fanciful image of four Congressmen so anxious to bring investment benefits to their districts that they reluctantly accept bribes on which they thought the investments were conditioned. Quite to the contrary, the evidence shows four Congressmen jumping at the chance to take a bribe and discussing investments in their districts as a convenient cover to justify their rendering of purchased legislative services. As Thompson said, anticipating possible criticism for helping the sheik, "I'm in a position to say well of course I'm helping this guy. Why shouldn't I help this guy . . . his money is helping my guys work everyday." Myers put it more bluntly: an investment in the district "gives me a little protection."

In addition, the district court specifically found, in the cases of Errichetti and Criden, "no evidence to connect their motivations for these crimes with their hoped-for bonanzas if the casino project went ahead." Pet. App. 153a.

Pet. 15.) But while petitioners detail Weinberg's alleged misdeeds at some length, they fail to show—and often do not even attempt to show—that these actions amounted to a violation of petitioners' rights.[19]

For the most part, the thrust of petitioners' argument seems to be that the Due Process Clause was violated by the mere "use of a personage such as Weinberg at all to 'sting' United States Congressmen" (82-1255 Pet. 32). Even accepting petitioners' allegations about Weinberg's character and conduct, it is well established that the government must sometimes use informants with such a background; indeed, as the district court explained (Pet. App. 179a), often the authorities use an informant precisely because they hope that a careful and sophisticated criminal, who would sense (or learn, upon investigating) the inauthenticity of an undercover law enforcement officer, might regard the informant as a genuine fellow criminal. For this reason, it is not enough for petitioners to assert that Weinberg was paid by the FBI,[20] or that Weinberg frequently acted in ways characteristic of a criminal.

Nor are petitioners entitled to immunity from prosecution on the basis of their assertions that Weinberg's supervision was inadequate. See, *e.g.*, 82-1255 Pet. 32. The district court specifically found that "the supervision imposed on Weinberg was more than adequate to the circumstances of this investigation." Pet. App. 164a. Even apart from this finding, petitioners attempt to make a serious showing of prejudice in connection with only one series of actions by Weinberg—his so-called "coaching" of petitioner Myers. This "coaching" consisted, according to petitioners, of telling Myers two things: that he should

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[19] See Pet. App. 198-199a ("Throughout these trials, defense counsel sought to make Weinberg's character and activities the key issue before the juries, thus distracting from the conduct and motivations of the defendants. These issues were unsuccessful 'red herrings' at the trials, and they are 'red herrings' still.").

[20] We note that Weinberg was not paid on a contingent fee basis. Pet. App. 51a.

be vigorous in insisting to the sheiks' representatives that he had the power to help the sheiks and would use it; and that he need not actually fulfill his promise. Petitioners also urge that similar "coaching" of Senator Harrison Williams, a defendant in another Abscam prosecution whose case is not before this Court, is also relevant.

i. The first alleged element of the "coaching" consisted simply in urging the suspects to make their representations of what they were willing to do in return for cash as explicit as possible. In many ways, this made the investigation more, not less, fair to the suspects. Indeed, petitioner Murphy criticizes the government for not taking steps to obtain more unequivocal evidence of his guilt. 82-1187 Pet. 18-22.[21] A public official who was unsure about the reason he was being offered money, or who was reluctant to sell his influence, would, when told that he should boast about his power in order to obtain a payment, surely should have demurred and refused to par-

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[21] Petitioner Murphy's argument on this point is essentially that "[g]iven the simple purpose of the October 20 meeting * * * and the agents' complete control over the events," any ambiguities in the videotaped dealings should be strictly interpreted against the government's version of the events. 82-1187 Pet. 20. But as the court of appeals pointed out (Pet. App. 46a), "[u]ndercover agents offering bribes to Congressmen are entitled to simulate the guarded conversation that would be expected of those proposing an unlawful venture. * * * They need not say, 'Congressman, I have here a cash bribe to be exchanged for your corrupt promise to be influenced in your official action.'" See also Pet. App. 246a-247a n.17 (during another Abscam investigation, petitioner Errichetti criticized an undercover agent for being insufficiently subtle in offering a bribe to an official). This is precisely the kind of issue one would have expected petitioner Murphy to raise forcefully before the jury, and there is no reason to second-guess the jury's resolution of it.

In any event, the government did not have "complete control" of the events; it videotaped them, but government agents were only some of the parties to the conversations. We also note that after Thompson insisted that the sheik's representatives be more subtle, it was surely reasonable for the agents to believe that Thompson's "pal," Murphy, who was brought to them by Thompson, would want to operate under a similar arrangement.

ticipate further in the scheme. As the court of appeals concluded (Pet. App. 44a):

> Suggesting how easy it is to commit a crime hardly establishes a due process violation. The "coaching," if it occurred, barely qualifies as any inducement at all; if the script was supplied, no one was coerced into playing his part. Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense, *United States* v. *Esquer-Gamez*, 550 F.2d 1231 (9th Cir. 1977), and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats, *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978). Whatever conduct might transgress the [Due Process Clause], * * * the facts of the Abscam investigation are not even close to the line. * * * [T]he record reveals that these Congressmen were not children of Hamelin, seduced by the piping of Melvin Weinberg.

ii. As the court of appeals also explained, it is far from clear that the other alleged form of "coaching"—telling petitioner Myers that he need not fulfill the promise he would make in return for the $50,000—was practiced in this case. See Pet. App. 34a-38a. But even assuming that it was, petitioners fail to show how such "coaching" could violate the Due Process Clause. Surely it did not place pressure on Myers to commit the offense; while it may have made the corrupt agreement more attractive to Myers because it suggested that he would not have to uphold his part of the bargain, that is scarcely the kind of inducement that might raise a question under the Due Process Clause. Indeed, the proposal that Myers take the sheik's money and then not fulfill his promise added an element of fraud beyond a simple exchange of influence for cash and should have been at least equally repulsive to an honest official.

Although petitioner Myers now contends only that the coaching violated the Due Process Clause, and does not

contend that it draws into question his guilt under the bribery statute, 18 U.S.C. 201(e), we note that the court of appeals considered and rejected the latter contention. First, as the court explained, the district judge accepted, for purposes of the trial, the contention that it would be a defense to a charge of bribery to show that the official who accepted the money had no intention of carrying out the agreement (Pet. App. 34a-35a):

> Judge Pratt * * * afforded the defendants in the *Myers* case wide latitude to present evidence in support of their claim. He then submitted the claim to the jury, under an instruction that the jury was not to convict unless the Government proved beyond a reasonable doubt that a Congressman who had accepted money in return for a promise to introduce immigration bills had done so with the intention of carrying out that promise. * * * The *Myers* jury obviously rejected the defense, and, on the evidence before them, they were certainly entitled to do so. * * * An entirely plausible inference even from the defendants' evidence, and the one the jury apparently accepted, is that Weinberg was not urging the Congressmen to utter promises they were reluctant to make and did not intend to keep, but was simply anxious to make sure that they fully and unambiguously expressed on videotape the promises they were all too ready to make and fully intended to keep.
>
> Moreover, after the trials were concluded, Judge Pratt afforded the defendants a full opportunity at the "due process" hearing to amplify the record to persuade him, as the trier of fact on the due process claim, that only a charade had occurred. After conducting a wide-ranging hearing, the District Judge found the claim unsupported as a factual matter, and his findings are not clearly erroneous.

In addition, the court of appeals concluded, after examining the language and legislative history of 18 U.S.C. 201(c), that "[w]ith respect to the bribery statute, * * * the defense of fraud is * * * unavailable. If Myers was 'playacting' and giving false promises of assistance to

people he believed were offering him money to influence his official actions, he violated the bribery statute." Pet. App. 42a-43a. We can think of no reason that Congress might have had for immunizing public officials who accept what would be a bribe but who know that they are defrauding the bribe-payer as well as the public. See also *United States* v. *Hood*, 343 U.S. 148, 151 (1952) (in construing a statute related to Section 201(c), "[w]hether the corrupt transaction would or could ever be performed is immaterial. We find no basis for allowing a breach of warranty to be a defense to corruption").

3. Petitioners Thompson and Criden claim that the prosecution improperly concealed exculpatory evidence. See 82-1240 Pet. 21-25; 82-1199 Pet. 62-65. Petitioner Criden's allegations concern only informant Weinberg; he claims that the jury was denied the opportunity "to evaluate not just Weinberg's sordid past, but the full extent of his venality during the investigation" (82-1240 Pet. 25). The district court (Pet. App. 93-98) and the court of appeals (*id.* at 52a-53a) considered these claims in detail and rejected them, showing that the petitioners were not deprived of any material information bearing on Weinberg's credibility. In addition, as both courts below noted, petitioners had ample opportunity to impeach Weinberg's credibility (*id.* at 52a, quoting *id.* at 230a-231a):

> Weinberg admitted that he had been a criminal most of his life, that he had made his living by being a con man, that he had lied and cheated and violated the law from his early teenage years, that he was a convicted felon, that he had made a deal with the government to cooperate in return for probation on his felony conviction in Pittsburgh, and that he had received substantial compensation for his cooperation in the Abscam investigation and trials.

Moreover, as the district judge, who presided at the trials, explained, these cases simply did not turn on Weinberg's credibility. Pet. App. 229a. To the extent the defendants raised serious factual issues at all, those issues concerned the interpretation of allegedly ambiguous acts and

statements made by petitioners. The jury was able to resolve these ambiguities by themselves viewing the acts and listening to the statements, which the government had recorded, and petitioners fail to show how the additional evidence that they assert the government should have uncovered and revealed would have helped them persuade the jury on the questions that were central to the case. Petitioner Criden's principal argument, for example, appears to be only that the additional evidence would have persuaded the jury "to reject Weinberg's denial that he orchestrated a charade in the *Myers* case" (82-1240 Pet. 22); but as we have explained, demonstrating the existence of a "charade" would not have been a defense.

Petitioner Thompson's claim (82-1199 Pet. 62-63) is that the government improperly concealed the "immunity" granted to Congressman Murtha, who testified against him (see page 9 note 7, *supra*). But not only was no immunity granted to Congressman Murtha; the question whether the likelihood of his being prosecuted would affect his credibility was fully aired at trial. The parties stipulated at trial that the government had "no present intention of prosecuting Congressman Murtha" (Tr. 2783),[22] and that stipulation was read to the jury. Petitioner Thompson's counsel stated that that stipulation was "fully acceptable on behalf of Mr. Thompson" (*ibid.*). The district judge, when he instructed the jury, reminded them of this stipulation and warned that Congressman Murtha's testimony should be considered "carefully" (Tr. 3081).

4. Petitioner Lederer, the only one of the petitioners who requested an entrapment instruction, appears to claim (82-1183 Pet. 19-22) that the government introduced insufficient evidence of his predisposition to commit the offenses charged. As the district court and the court of appeals explained, Lederer's prompt response to the offer of a bribe—his "ready complaisance" as Judge

[22] We rely on the brief filed by the United States Attorney in the court of appeals for citations to the transcript.

Learned Hand termed it (*United States* v. *Becker*, 62 F.2d 1007, 1008 (2d Cir. 1933), quoted at Pet. App. 207a)—was ample evidence of predisposition:

> In seeking only $5,000 for himself out of the $50,000 he received, Lederer displayed neither the greed of Myers nor the guile of Thompson and Murphy; nevertheless, the evidence at his trial fully entitled the jury to find his predisposition beyond a reasonable doubt. Predisposition may be established by "the accused's ready response to the inducement." The videotape of the September 11 meeting reveals Lederer responding with alacrity. As he assured the sheik's representatives, "I'm not a Boy Scout."

Pet. App. 29a-30a; citations omitted. See *id.* at 207a-208a.

Petitioner Lederer appears to urge (82-1183 Pet. 20-21) that only past evidence of criminal activity and not just an eager response to a government offer can possibly establish predisposition, but he fails to cite anything in an opinion of this Court, or in logic, that supports such a rule. Nor, contrary to the heading in his petition (*id.* at 19), does he cite any decision of a lower federal court that has embraced such a rule; on the contrary, courts have consistently rejected it. See, *e.g.*, *United States* v. *Jannotti*, 673 F.2d 578, 604 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) (citing cases).

Petitioner Lederer also urges (82-1183 Pet. 24-25) that this Court resolve what he describes as a conflict among the credits on the question whether a defendant must admit the acts charged, in order to have an entrapment defense submitted to the jury. Specifically, petitioner Lederer suggests that he wished to claim both that he was entrapped and that he was receiving only a legal campaign contribution. But the jury in Lederer's case was given an entrapment instruction (Pet. App. 107a); and Lederer never attempted or offered to testify at trial that he was receiving only a campaign contribution (*id.* at 50a & n.20). Nothing in the district court's opinion, the court of appeals' opinion, or the law of the Second

Circuit[23] suggests that Lederer would have been barred from offering both defenses if he had sought to do so; and having not sought to do so at trial, he certainly cannot now invoke a supposed conflict among the circuits on an issue not implicated in his case.

5. Petitioners assert that the courts below committed a number of other errors, but in no instance do they show why these claims raise issues requiring this Court's review. For example, petitioner Murphy's principal contention (82-1187 Pet. 5-13) is that a supplemental instruction given by the district court in response to the jury's written question was incorrect. Since this was not even a standard instruction but one devised by the district court in an effort to clarify the particular matter about which the jury inquired, it is clear that there is no need for this Court to review the court of appeals' decision that the district court did not err.

In any event, petitioner Murphy's highly attenuated argument on this point is insubstantial. The district judge initially instructed the jury: " 'It is for you to determine based on all of the evidence whether the Government has established beyond a reasonable doubt that the money in the briefcase transferred from Amoroso to Criden on October 20 [the date of the meeting among Amoroso, Weinberg, Criden, and Murphy] was for the benefit of and *eventually received* by defendant Murphy or defendant Thompson or both.' " Pet. App. 62a (emphasis added by the court of appeals). This instruction was given in connection with the bribery charge, but the district court told the jury that it applied to the "re-

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[23] The Second Circuit has permitted a defendant raising an entrapment defense to assert his innocence on other grounds, so long as he "did not take the stand to deny personally his participation in the transaction and did not affirmatively introduce any other evidence that he was not involved." *United States* v. *Valencia*, 645 F.2d 1158, 1172 (2d Cir. 1980). See also *United States* v. *Mayo*, No. 82-1256 (2d Cir. Apr. 8, 1983), slip op. 2976; *United States* v. *Williams*, No. 82-1111 (2d Cir. Apr. 5, 1983), slip op. 2841-2842 n.5.

ceipt" element of the unlawful gratuity and conflict of interest counts as well. *Ibid.* Petitioner Murphy does not object to this instruction. 82-1187 Pet. 7.

During its deliberations, the jury sent the following inquiry to the judge:

> Some members of the jury feel it is possible that defendant Murphy took "direction & control" of the briefcase however momentarily by instructing Criden to take physical possession, making Criden the "executor" of the money in a sense at that point.
>
> May we construe this to be in satisfaction of element one of Count 2 in lieu of "*eventually*["] receiving the money at some later time?

Pet. App. 63a-64a (emphasis by the jury). After an extended discussion with counsel, the district judge responded to the question. His supplemental instruction, reproduced at 82-1187 Pet. App. 97a-99a, began by reminding the jury that the central question was whether Murphy received the money. The district judge then noted that the jury emphasized "eventually," and said that he interpreted the question to be asking whether the receipt *must* have been "eventually, and not then, October 20th," at the meeting. *Id.* at 98a.

The judge answered this question by saying:

> [M]y answer to you is that in applying this element to the defendant Murphy, you may disregard the term eventually. It is for you to evaluate what was said, what happened, what all the circumstances were, and determine from that whether the defendant Murphy received the money.

82-1187 Pet. App. 98a. The district judge immediately added that "[i]t is absolutely critical * * * that he would have to know that it was money that was in the briefcase. * * * [C]ertainly if you should find that he did not know that there was money in that briefcase while that was going on, then unquestionably you should find him not guilty on all the substantive charges." *Ibid.* The district judge then summed up: "If you are talking simply about

the temporal aspect of this, the timing now as opposed to eventually, the answer is yes. You may construe those circumstances to be receipt of this money on or shortly after October 20, 1979" (*id.* at 98a-99a). After the jury resumed its deliberations, Murphy's counsel made the single objection that the judge may have left it unclear at one point that the government had the burden of proof; the district court immediately recalled the jury and clarified that point. *Id.* at 99a-101a.

The jury's inquiry referred specifically to count two, charging bribery, on which petitioner Murphy was acquitted. His counsel never requested the district judge to clarify the relationship between the supplemental instruction and the other counts. See Pet. App. 66a n.24.

Moreover, petitioner Murphy does not point to a single sentence of the instruction that misstated the law. It appears that petitioner Murphy would have interpreted the question differently, to be asking about the relationship that had to exist between Criden and Murphy in order to find that Murphy received the money on October 20.[24] Also, petitioner Murphy in retrospect (although he did not so indicate at the time) apparently would not have reemphasized the point that he was not guilty if he did not know the briefcase contained money, although that was a central contention of his defense (see Pet. App. 65a, 67a; 82-1187 Pet. App. 88a). But at least so long as the district judge did not misstate the law, these were plainly matters to be confided to his discretion, subject to the review of the court of appeals. That court found that "Judge Pratt's handling of the episode was admirable under the circumstances." Pet. App. 68a.

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[24] On this point the court of appeals noted (Pet. App. 67a-68a): Counsel had ample opportunity after hearing both the substance of Judge Pratt's proposed response and the delivery of the response to suggest additional language explicating constructive possession. If the jury's approximation of the concept evident from the text of their inquiry required refinement, the opportunity for amplification was available to the defendants both before and after the instruction was given.

b. Petitioner Thompson contends (82-1199 Pet. 58-61) that the district court, although acting in accordance with established Second Circuit precedent, gave too harsh an instruction on his credibility as a witness. Even petitioner Thompson's own account shows that the judge's statement that Thompson, because he was a defendant, had a motive to testify falsely, was immediately balanced by the statement that " 'it by no means follows that he's not capable of telling the truthful, straightforward story' " (*id.* at 59). In addition, the district judge pointed out that the jury should "consider that [a defendant] takes a real risk by taking the stand and subjecting himself to cross-examination" (Tr. 3055).[25] See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973) (invoking "the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

The cases cited by petitioner Thompson, far from supporting him, show the incorrectness of his contention. In *Hicks* v. *United States*, 150 U.S. 442, 452 (1893), the Court strongly suggested that an instruction pointing out that a defendant who testified had a motive to lie would *not* be sufficient to warrant the reversal of a conviction. In *Reagan* v. *United States*, 157 U.S. 301 (1895), the Court upheld an instruction that drew the defendant's credibility into question at least as sharply as the district court's charge in this case; immediately after the passage quoted by petitioner Thompson (82-1199 Pet. 60-61), the Court stated (157 U.S. at 310-311):

> On the other hand, the court may, and sometimes ought, to remind the jury that interest creates a motive for false testimony; that the greater the interest the stronger is the temptation, and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony. * * * [T]he

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[25] See page 26 note 22, *supra*.

> court may charge the jury that the peculiar and deep interest which the defendant has in the result of the trial is a matter affecting his credibility, and to be carefully considered by them.

In *Taylor* v. *United States*, 390 F.2d 278, 284-285 (8th Cir. 1968), the court carefully distinguished between its holding—that the judge could charge a jury that the defendant had a peculiar interest in testifying falsely—and its suggestion that trial judges might wish to avoid such a charge. *United States* v. *Saletko*, 452 F.2d 193, 197-198 (7th Cir. 1971), cert. denied, 405 U.S. 1040 (1972), followed *Taylor* in both respects.

c. Finally, petitioners Myers, Errichetti, and Johanson challenge (82-1255 Pet. 56-64) the district court's admission of evidence of the videotaped meeting among Myers, Criden, and two FBI undercover agents posing as the sheik's representatives, at which Myers complained about the small size of his share of the $50,000 handed to him at the earlier meeting. Petitioners contend that this evidence should not have been admitted because that meeting occurred after the meeting at which the money was passed and the criminal transaction consummated. But it is entirely clear that Myers' subsequent remarks were relevant, because they "illuminat[ed] the nature of the conspiracy" (Pet. App. 56a) between the sheik's representatives and petitioners. Indeed, as the court of appeals noted (Pet. App. 56a), these conversations were in fact part of the conspiracy charged in the indictment (although the district court, in an excess of caution, instructed the jury otherwise) and were therefore fully admissible on that ground. Moreover, it is far from clear that evidence of an inculpatory *statement* like Myers'—that constitutes only an admission or an explanation of a prior act—is evidence of "other crimes, wrongs, or acts" within the meaning of Fed. R. Evid. 404(b). In any event, that rule, on its face, permits evidence of "other crimes, wrongs, or acts" to be admitted for such purposes as "proof of motive, * * * intent, * * * plan [or] knowl-

edge"; the rule does not distinguish between acts committed prior to the alleged crime and subsequent acts.

Petitioners urge that *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978), stands for the proposition that evidence of subsequent acts may not be used. But the panel in *Boyd* narrowly limited its ruling. It suggested that the subsequent acts evidence was being used only to show bad character; it specifically distinguished several cases that permitted evidence of subsequent acts to be admitted; and it explicitly stated that its holding was not inconsistent with *United States* v. *Laurelli*, 293 F.2d 830 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). In *Laurelli*, the court of appeals upheld the admission of evidence of an offer of a bribe that occurred after the bribe attempt for which the defendant was indicted, on the ground that it "tended to show * * * intent" (*id.* at 832). The court also noted that "[w]e have held in a number of cases that evidence of similar acts subsequent to the one being tried is admissible" (*ibid.*). Indeed, Judge Hunter concurred in *Boyd* on the explicit understanding that the court had not held that evidence of subsequent crimes was generally inadmissible. See 595 F.2d at 126-127.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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